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SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

RIN 3245-AG68

Small Business Investment Companies (SBIC); Early Stage Initiative

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Small Business Administration (SBA) is withdrawing its proposed rule published on September 19, 2016. SBA proposed making changes to its Early Stage Small Business Investment Company (SBIC) initiative, which was launched in 2012. SBA is withdrawing the proposed rule because very few qualified funds applied to the Early Stage SBIC initiative, the costs were not commensurate with the results and the comments to the proposed rule did not demonstrate broad support for a permanent Early Stage SBIC program.

DATES: SBA is withdrawing the proposed rule published on September 19, 2016 (81 FR 64075) as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background Information

In the Small Business Investment Act of 1958 (Act), Congress created the Small Business Investment Company (SBIC) program to “stimulate and supplement the flow of private equity capital and long-term loan funds which small-business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization, and which are not

available in adequate supply” 15 U.S.C. 661. Congress intended that the program “be carried out in such manner as to insure the maximum participation of private financing sources.”

Id. In accordance with that policy, the U.S. Small Business Administration (SBA) does not invest directly in small businesses. Rather, through the SBIC program, SBA licenses and provides debenture leverage to SBICs. SBICs are privately-owned and professionally managed for-profit investment funds that make loans to, and investments in, qualified small businesses using a combination of privately raised capital and debenture leverage guaranteed by SBA. SBA will guarantee the repayment of debentures issued by an SBIC (Debentures) up to a maximum amount of \$150 million per SBIC based on the amount of the SBIC’s qualifying private capital, defined in SBA regulations as Regulatory Capital (consisting of paid-in capital contributions from private investors plus binding capital commitments from Institutional Investors, as defined in existing §107.50). SBA will typically provide an SBIC with up to two “tiers” of leverage (a two-to-one match between leverage and Regulatory Capital).

The standard Debenture requires semi-annual interest payments. Consequently, most SBICs finance later stage small businesses with positive operating cash flow, and most structure their investments as loans or mezzanine debt in an amount that is at least sufficient to cover the SBIC’s Debenture interest payments. Early stage companies typically do not have positive operating cash flow and therefore cannot make current interest or dividend payments. As a result, investments in early stage companies do not fit naturally with the structure of debenture leverage.

Early stage businesses without the necessary assets or cash flow for traditional bank funding face difficult challenges accessing capital. As a result of this capital gap, on April 27, 2012, SBA published a final rule (77 FR 25042) to define a new sub-category of SBICs. SBA’s intent

was to license over a 5-year period (fiscal years 2012 through 2016) venture funds focused on early stage businesses. Because Early Stage SBICs present a higher credit risk than traditional SBICs, that rule authorized SBA to guarantee Debentures in an amount equal to each Early Stage SBIC's Regulatory Capital (one tier of leverage, rather than the two tiers typically available to traditional SBICs), up to a maximum of \$50 million. SBA targeted an allocation of \$200 million per year (\$1 billion total) of its SBIC Debenture authorization over these years to this effort.

In order to determine potential changes needed to attract sufficient interest from qualified early stage fund managers to apply for the Early Stage SBIC program, SBA sought input from the public through an Advance Notice of Proposed Rulemaking (ANPRM) on March 18, 2015 (80 FR 14034). Based on comments on the ANPRM and additional discussions SBA held with industry participants, SBA published a proposed rule (81 FR 64075) on September 19, 2016, to make changes to make the Early Stage SBIC program more attractive and make the program a permanent part of the SBIC program. These changes included: (1) extending the program past FY 2016; (2) modifying Early Stage licensing procedures to be more consistent with other SBICs by allowing Early Stage SBIC applicants to apply at any time and allowing existing Early Stage SBICs to apply for a subsequent license; (3) allowing Early Stage SBICs to use a line of credit without SBA's prior approval; and (4) increasing the maximum leverage from \$50 million to \$75 million.

II. Reason for Withdrawal

In determining whether to publish a final rule, SBA evaluated the results of the Early Stage SBIC Initiative, the costs of the initiative and the comments received on the proposed rule.

Between 2012 and June 2016, SBA received 62 applications to the Early Stage SBIC program, but licensed only 5 Early Stage SBICs. Those applicants that were not licensed failed

to meet SBA's licensing criteria. Many of the applicants had management teams with limited track records and few positive realizations. Although SBA sought to increase the number of applicants to the Early Stage SBIC initiative, at the end of FY 2016, none of the SBIC applicants utilizing an early stage investment strategy in SBA's licensing pipeline sought to issue SBA-guaranteed Debentures or to be licensed as an Early Stage SBIC. SBA has and will continue to license qualifying early stage venture funds that do not intend to issue SBA-guaranteed Debentures. Although venture capital funds pursuing an early stage investment strategy are not prohibited from applying to the program as a leveraged SBIC, SBIC guaranteed Debentures are not well-suited to an early stage investing strategy since many early stage investments do not provide ongoing cash flows needed to pay the current interest and annual charges associated with SBA guaranteed debentures. Based on its evaluation of the Early Stage initiative, SBA concluded that there are insufficient qualified early stage fund management teams that are interested in using SBA-guaranteed leverage under the terms needed to make the Early Stage SBIC initiative a permanent part of the SBIC program.

SBA also considered costs in determining whether to withdraw the proposed rule. As noted in the April 27, 2012, final rule, due to the risk associated with this class of SBICs, SBA increased the annual charge for all SBICs issuing Debenture leverage in order to implement the Early Stage SBIC initiative. The September 2016 Early Stage SBIC proposed rule stated that because Early Stage SBICs invest in early stage investments with higher risk, the rule would continue to apply a higher annual charge payable by all SBICs issuing SBA-guaranteed Debentures. SBA expected to allocate no more than approximately \$200 million in leverage commitments to Early Stage SBICs each year after FY 2017, which allocation was expected to increase the cost to all SBICs issuing SBA-guaranteed debentures by increasing the annual fee

payable by all such SBICs by approximately 14 basis points. For an SBIC issuing \$100 million in SBA-guaranteed Debentures, 14 basis points would equate to \$140,000 per year. SBICs typically issue Debenture leverage over 4 to 6 years (using multiple commitments) and begin paying back leverage as the fund harvests its investments after that period. Based on Debenture pools since 1992 that have been fully repaid, the average hold period is approximately 6 years. Therefore the 14 basis points addition for an SBIC issuing \$100 million in SBA-guaranteed Debentures would equate to \$840,000. If the SBIC held the leverage for the full 10-year term, this would equate to \$1,400,000 for a single SBIC over that timeframe. Between FYs 2012 and 2017, SBA approved on average \$2.28 billion aggregate debenture commitments per year. If an additional 14 basis point charge were in effect, SBICs would incur over \$3.2 million per year in additional fees, or approximately \$19 million over the average 6 year holding period for SBIC-guaranteed Debentures. This is capital that SBICs could otherwise deploy to small businesses. Additionally, SBA must expend additional administrative costs to oversee these SBICs and to maintain subsidy formulation and re-estimate models. SBA received four comment letters on the proposed rule. Among other things, these comments requested changes to the payment structure of the Early Stage debenture – partial, as opposed to full prepayments – which structure SBA has determined is not workable. Another comment suggested that the amount of leverage SBA intended to allocate to Early Stage SBICs on an annual basis was perceived as a limit which placed unacceptable risk to management teams that would otherwise be interested in applying to the program. As discussed above, in order to determine the annual charge as required by the Act, if the proposed rule became final, SBA would be required to allocate an amount of leverage to Early Stage SBICs on an annual basis. Other comments suggested concerns or requested

clarifications. It was not evident to SBA from these comments that the proposed rule was broadly supported by SBIC program stakeholders.

The withdrawal of the proposed rule does not impact the Early Stage regulations contained in 13 CFR Part 107 or the five currently licensed Early Stage SBICs. Such Early Stage SBICs remain subject to the Act, applicable regulations at 13 CFR Part 107 and SBA policies.

Executive Order 13771

The withdrawal of the proposed rule qualifies as a deregulatory action under Executive Order 13771. See OMB's Memorandum titled "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5, 2017).

Accordingly, for the reasons stated in the preamble, the proposed rule published at 81 FR 64075 on September 16, 2016 is withdrawn.

Authority: 15 U.S.C. 634(b)(6).

Dated: May 12, 2018.

Linda E. McMahon,
Administrator.

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